

SURROGACY IN THE NETHERLANDS

CAN A SURRGATE REMAIN AUTONOMOUS IN A REGUATED SURROGACY MARKET?

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Abstract

With a new law proposal for surrogacy in The Netherlands that still needs to be adapted before it will be discussed in parliament it is important to ask questions about how we want to approach gestational surrogacy in The Netherlands. An important concern is if the surrogate will be able to act as an autonomous agent during the surrogacy process. In this thesis the question will be answered if a regulated surrogacy market that respects the surrogate's autonomy can be an alternative to altruistic surrogacy in The Netherlands. The aim of this thesis is to take a first step in arguing that a regulated surrogacy market is preferable over altruistic surrogacy under specific circumstances that will be outlined in this thesis. Several arguments against a surrogacy market will be discussed. These include concerns about the bond that may develop between the surrogate and the fetus, the role of the identity of the surrogate in this process, concerns about the surrogate changing her mind and the impact of the patriarchal and capitalistic society on the ethical permissibility of altruistic surrogacy in The Netherlands. A first step will be made in proposing a regulated surrogacy market that is built on a the distinction between fetus and child stating that the surrogate is responsible for the fetus and the intended parents for the child.

Keywords: gestational surrogacy, autonomy, public policy, artificial reproductive technology, parenthood, The Netherlands, infertility

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Introduction

For many people having children is an essential part of a successful and happy human experience. This dream can be realised for many when they find a partner who shares this dream, but for some people building a family is more complicated. There are many ways to build a family and many different family constructions. The one father and one mother family construction, that some regard as a 'natural family', is no longer the only one. For those who are unable to carry a child, adoption or surrogacy can be ways to build a family. For many people having a child who is biologically related to them is important and this can be a reason to prefer surrogacy over adoption.^{1 2} With traditional surrogacy – where the surrogate is also the biological mother of the child – no medical assistance is needed and this practice is therefore not as affected by public policy. That is why I will focus on the practice of gestational surrogacy in The Netherlands. A gestational surrogate carries a child to whom she is not biologically related. Currently only altruistic surrogacy – where the surrogate is only compensated for expenses and not paid for her labour – is legal in The Netherlands.

Surrogacy, especially surrogacy markets, are a controversial topic with many ethical concerns. As surrogacy is closely related to (cultural) values there are significant differences between countries. In The Netherlands for example, we highly value having the ability to find out your biological heritage. This is why anonymous egg or sperm donations are not accepted here anymore since 2004.³ In a lot of other countries however, anonymous donations are still legal. One of the most important objections to surrogacy markets is the concern that the surrogate will lose her⁴ autonomy.^{5 6 7 8} The

¹ Olga van den Akker, "The Acceptable Face of Parenthood: The Relative Status of Biological and Cultural Interpretations of Offspring in Infertility Treatment," *Psychology, Evolution & Gender* 3, no. 2 (2001): 147, <https://doi.org/10.1080/14616660110067366>

² Lucy Blake, Martin Richards, and Susan Golombok, "The families of assisted reproduction and adoption," In *Family-making: Contemporary ethical challenges*, ed. Francoise Baylis and Carolyn McLeod, (Oxford: Oxford university press, 2014), 65-66.

³ "Wet donorgegevens kunstmatige bevruchting", July 1, 2021, Retrieved from:

<http://deeplinking.kluwer.nl/?param=00D656E8&cpid=WKNL-LTR-Nav2> (accessed June 4, 2022).

⁴ In the literature the surrogate is also always referred to with female pronouns, however not everyone who is able to be a surrogate identifies as female. Despite this I have chosen to use female pronouns in this thesis to do justice to the argumentation I am referencing. This choice is therefore not a choice that is supporting a binary view of the world, but one to give an honest as possible account of the view of others for the sake of the argument.

⁵ Debora L. Spar, *The baby business: how money, science, and politics drive the commerce of conception* (Boston, Massachusetts: Harvard business school press, 2006), 83.

⁶ Renate Klein, *A human rights violation* (Australia: Spinifex Press, 2017), 67-68.

⁷ Malene Tanderup, Reddy, S., Patel, T. et al. "Reproductive Ethics in Commercial Surrogacy: Decision-Making in IVF Clinics in New Delhi, India", *Journal of Bioethical Inquiry: An Interdisciplinary Forum for Ethical and Legal Debate* 12, no. 3 (2015): 499. <https://doi.org/10.1007/s11673-015-9642-8>.

⁸ Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade*, (London: Routledge, 2003): 163-164.

concern is that since the surrogate is carrying a fetus for other people, referred to as the intended parents, they are allowed to make decisions during the pregnancy. When a surrogate loses her autonomy her right to bodily integrity can also be harmed, something that would go against article 11 of the constitution.⁹ This can very quickly lead to horror scenario's where a surrogate is, for example, forced to terminate the pregnancy or to have a caesarean section that is not medically indicated.¹⁰ These concerns are not just hypothetical, they are a daily reality in the transnational surrogacy market.¹¹ By banning commercial surrogacy in The Netherlands we cannot stop this practice from happening, it is just happening without our regulation. In the United States, Georgia and Ukraine for example, commercial surrogacy is legal and a big business. When intended parents arrive from a country where commercial contract surrogacy is illegal it is very easy to change the paperwork in a way that it confirms that the payment of the surrogate was actually just compensation for loss of income, clothes, food, etc as is confirmed by Mariam Kukunashvili, who runs New Life, one of the biggest surrogacy agencies in the world.¹²

The problems that occur with the transnational surrogacy market however, should not be the main argument against any form of commercial contract surrogacy. The argumentation should go beyond simply pointing to possible undesirable effects.¹³ Something as life changing as surrogacy should only be part of our lives if all parties are respected. Since we cannot control surrogacy practices in other countries, it is argued that surrogacy needs to be organised better in The Netherlands to avoid that people go abroad for surrogacy as this comes with significant risks.^{14 15}

In April 2020 a new law proposal for surrogacy in The Netherlands was posted online for public consultation.^{16 17} The main goal of this proposal is to create a system for surrogacy within The Netherlands, that respects the Dutch values, like having access to

⁹ "Artikel 11: Onaantastbaarheid lichaam", *De Nederlandse Grondwet*, June 13, 2022, <https://www.denederlandsegrondwet.nl/9353000/1/j9vkl1ouc6v2/vgrnblu821m2>

¹⁰ Tanderup, "Reproductive Ethics in Commercial Surrogacy," 498.

¹¹ Tanderup, "Reproductive Ethics in Commercial Surrogacy," 493-494.

¹² De baby-industrie, "Georgisch geluk", *npostart* video, 35.17, March 29, 2018, https://www.npostart.nl/de-baby-industrie/29-03-2018/KN_1697961

¹³ Richard J. Arneson, "Commodification and Commercial Surrogacy." *Philosophy & Public Affairs* 21, no. 2 (1992): 145, <http://www.jstor.org/stable/2265230> (accessed 12 June, 2022).

¹⁴ Raad voor de kindbescherming – ministerie van Justitie en Veiligheid, "Ouders en draagmoederschap", *kinderbescherming*, May 31, 2022, <https://www.kinderbescherming.nl/themas/draagmoederschap/ouders-en-draagmoederschap>.

¹⁵ Stephen Wilkinson, "Exploitation in International Paid Surrogacy Arrangements: Exploitation in International Paid Surrogacy Arrangements," *Journal of Applied Philosophy* 33, no. 2 (2016): 139. <https://doi.org/10.1111/japp.12138>.

¹⁶ "Wet kind, draagmoederschap en afstamming", Overheid, June 8, 2022, <https://www.internetconsultatie.nl/kinddraagmoederschapenafstamming>

¹⁷ The advice committee of Raad van State has advised not to present this proposal to the house of representatives (Tweede Kamer) until several points were addressed. More information about this decision and the specific concerns can be found at: Raad van State, "Wet kind, draagmoederschap en afstamming," June 15, 2022, <https://www.raadvanstate.nl/actueel/nieuws/@123710/w16-20-0469-ii/>

your genetic and gestational heritage, and to make international surrogacy less attractive.¹⁸ However, in the new law proposal it will be easier to recognise legal parentage after surrogacy abroad. The financial compensation that was part of this surrogacy agreement will not play a role in the assessment of legal parentage.¹⁹ This means that commercial surrogacy contracts will be accepted in The Netherlands as long as the surrogate lives outside the Dutch borders. This introduces the question if we should continue to only support altruistic surrogacy or if there is an ethical version of a surrogacy market that we should consider. There are many important elements to this question. One topic that should remain central in the surrogacy debate, but that is outside the scope of this thesis, is the physical and psychological wellbeing of surrogacy children and how they can be protected by policy. Another important concern in the surrogacy debate relates to the surrogate's autonomy this will be the focus of this thesis. The following question will be answered: Can a regulated surrogacy market in The Netherlands be an alternative to altruistic surrogacy that respects the surrogate's autonomy? The aim of this thesis is to take a first step in arguing that a surrogacy market is preferable over altruistic surrogacy under specific circumstances that I will outline in this thesis.

I will start in chapter one with addressing the argument by Elizabeth Anderson that if a surrogacy contract is treated as any other contract women cannot be autonomous once they sign it. By discussing the standard of performance in a standard contract, that can lead to surrogacy being interpreted as the practice of selling babies, I will argue that Anderson is right. Accepting this approach would mean all control can be taken away from the surrogate as it gives the intended parents contractual power over the surrogate's body and a different approach is required.

I will introduce an alternative approach in chapter two and propose that the surrogate's autonomy needs to be protected by a contract as she needs to remain able to make autonomous decisions about her body. I will propose a strict split in responsibility that does justice to the reality of surrogacy: the surrogate is responsible for the fetus and the intended parents are responsible for the child. Combined with redefining the standard of performance as 'giving the intended parents a fair chance of parenthood by offering gestational labour', this reason to control the surrogate, that is taken as justification, is taken away from the intended parents. This way the surrogate's autonomy becomes secured in the contract and the intended parents' interests are

¹⁸ Ministerie van Justitie en Veiligheid, "Concept memorie van toelichting Kind, draagmoederschap en afstamming", May 31, 2022, <https://www.internetconsultatie.nl/kinddraagmoederschapenafstamming>, 2-3.

¹⁹ Ministerie van Justitie en Veiligheid, "Concept memorie van toelichting Kind, draagmoederschap en afstamming", 10-11.

protected by the contractual agreement that after birth the surrogate has to give them their child.

In chapter three and four I will discuss four further common arguments against a surrogacy market, because of the influence this can have on the surrogate's autonomy. In chapter three I will focus on the contract itself and in chapter four on the payment aspect of a surrogacy market. The first two arguments are on a personal level, about the surrogate herself (§3.1) and the bond she may develop with the fetus (§3.2). I will argue that the assumptions about this bond is based on a biological bias and that if this bond will be accepted as a valid reason to ignore an autonomously signed contract, harmful stereotypes and prejudices of women will be reinforced. The last argument of chapter three is on a contract level and deals with the concern that before conception the surrogate cannot predict how she will feel after the child is born (§3.3). It is argued that this lack of understanding will limit the surrogate's autonomy. I will use the example of an advance directive to argue that this does not have to be the case.

In chapter four I will discuss the last argument that is on a societal level. An important argument against a surrogacy market is that it is different than other human labour and therefore it should be treated differently. By not treating a surrogacy contract in the same way as other contracts I am confirming this standpoint. However, I will argue that this is not a valid argument not to pay women for their labour as when women's autonomy is respected, surrogacy can be a way to break with the patriarchal structures. Besides this, we also live in a capitalistic society where respect is shown by paying a fair wage for labour. I will argue that if we regulate the market and adapt the contract for surrogacy to respect autonomy, a step can be made towards a surrogacy market in The Netherlands that is preferable over the currently accepted altruistic surrogacy.

1. Asymmetry: surrogacy and other human labour

In this chapter I will address an important argument from philosopher Dr. Elizabeth Anderson who specialises in feminist theory. She argues that if a surrogacy contract is treated as any other contract, women cannot be autonomous once they sign it.²⁰

Altruistic surrogacy is built on a trust bond between the surrogate and the intended parents. Currently this is the only accepted form of surrogacy in The Netherlands. The surrogate has to trust that the intended parents will indeed adopt the child and the intended parents have to trust the surrogate to give up parental rights.²¹ With the new law proposal a step is made to break with this tradition in The Netherlands to make sure that the intended parents are registered as the legal parents of the child from birth.²² Accepting a legally binding surrogacy contract (hereafter referred to as surrogacy contract or simply contract), would be a step further to protect all parties involved in the surrogacy process. With the term 'surrogacy process' I will refer to the time from the moment the surrogate and the intended parents meet till the end of the pregnancy.

With a surrogacy contract the trust between the surrogate and the intended parents is (at least partially) replaced with a legally binding surrogacy contract to make sure all parties follow the original agreement. The relation between the use of a contract and autonomy stems from the nineteenth century.²³ At this time the idea that 'freedom' actually means freedom of contract became the foundation of liberal thinking. As long as contracts were signed freely by autonomous individuals, it was stated that there was no reason to complain about a loss of freedom.²⁴ This is how a requirement to enter a (valid) contract became the ability to make an autonomous decision if you want to sign or not.²⁵ This approach to the use of contracts introduces an important concern for a surrogacy market, like Anderson's argument that a surrogacy contract needs to be treated differently from other contracts. Her concern is based on the idea that the contract will be the controlling influence that prohibits the surrogate from making free

²⁰ Elizabeth S. Anderson, "Is Women's Labor a Commodity?," *Philosophy & Public Affairs*, Vol. 19, No. 1 (1990): 89-90. <https://www.jstor.org/stable/2265363> (accessed May 10, 2022).

²¹ The reason why this transfer of parental rights from surrogate to intended parents is needed, is an old roman law 'mater semper certa est' (the mother is always certain) that is still part of our 'person and family law'. More information about this law and how it influences surrogacy can be found at: "Personen- en familierecht (boek 1) - Titel 11. Afstamming, afdeling 1, artikel 198", December 5, 2015, Retrieved from: <http://deeplinking.kluwer.nl/?param=00CAB6A3&cpid=WKNL-LTR-Nav2> (accessed July 4, 2022).

²² Ministerie van Justitie en Veiligheid, "Concept memorie van toelichting Kind, draagmoederschap en afstamming", 13-15.

²³ Peter Nolan, *Capitalism and Freedom: the contradictory character of globalisation*, (London: Anthem Press, 2007), 13. Retrieved from: https://search-ebSCOhost-com.proxy.library.uu.nl/login.aspx?direct=true&db=nlebk&AN=375373&site=ehost-live&ebv=EB&ppid=pp_13

²⁴ Nolan, *Capitalism and Freedom: the contradictory character of globalisation*, 13.

²⁵ Idem.

choices or be forced into behaviour during her pregnancy. This is in line with the ideas about autonomy from Beauchamp and Childress who also see the ability to act without controlling influences as a requirement to act autonomously.²⁶

When making a choice about accepting surrogacy contracts it is important to consider how we normally use a contract and what implications this will have if it is applied to surrogacy. When using a contract three central elements need to be defined: the standard of performance, how to check if this standard is met and what to do when it is not met and the contract is breached. I will discuss these three elements in this chapter with examples from surrogacy markets in other countries to argue that Anderson is right in stating that surrogacy contracts need to be treated differently from other human labour contracts if we want a surrogacy market that respects the surrogate's autonomy. I do not agree however that the differences between gestational labour and other human labour should be used to argue that people should not be paid for reproductive labour, as I will argue in chapter four.

§1.1 Standard of performance

Generally what a contract is supposed to offer is clarity about the standard of performance: stating when the requirements of the contract are met. There are two approaches to define the standard of performance that are relevant for surrogacy contracts: the sale of goods or making a distinction between a sufficient and an insufficient performance.^{27 28} In this paragraph I will discuss these two options and the implications these approaches can have for surrogacy.

If a surrogacy contract is seen as the sale of goods, this will lead to clear commodification of the child as the intended parents have the right in this system to reject a child for any reason.²⁹ This means that a child can be rejected for their eye or hair colour. Accepting this approach means taking the step to accepting designer babies

²⁶ Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, (Oxford University Press, Incorporated, 2001), 58. Retrieved from: <http://ebookcentral.proquest.com/lib/uunl/detail.action?docID=5763592>

²⁷ Jason Gordon, "What is performance of a contract?", The business professor, June 13, 2022, https://thebusinessprofessor.com/en_US/122296-law-transactions-amp-risk-management-commercial-law-contract-payments-security-interests-amp-bankruptcy/performance-substantial-performance-breach

²⁸ Claire Horner, "My Child, Your Womb, Our Contract: The Failure of Contract Law to Protect Parties in Gestational Surrogacy," In: *Reproductive Ethics*, ed. Lisa Campo-Engelstein, Paul Burcher, (Springer Cham, 2007), 145. DOI: 10.1007/978-3-319-52630-0_10

²⁹ Horner, "My Child, Your Womb, Our Contract", 145.

in the extreme.³⁰ This is an unacceptable situation and therefore a common argument against surrogacy contracts.³¹

Another problem with the 'sale of goods' approach for surrogacy is that the child will become the standard of performance. Surrogacy can then be interpreted as the practice of selling babies. This baby-selling argument is specifically relevant in regards to the surrogate's autonomy since this can be used as an argument to give the intended parents control over the surrogate. As long as the surrogate is carrying the fetus, she has a product that the intended parents own.³² This will then carry the risk that the surrogate's bodily integrity and autonomy will severely be harmed for the duration of the pregnancy. Using a sale of goods approach for surrogacy is therefore not an option.

Another approach to defining the standard of performance is to make the distinction between a sufficient and an insufficient performance. An insufficient performance is then seen as a breach of contract. This raises the question what this should be in the case of gestational surrogacy. Claire Horner, an assistant professor and a clinical ethicist who is focussed on the ethics of reproductive technology, argues that the essence of surrogacy is to deliver an acceptable child.³³ This leads her to conclude that surrogacy contracts are a lot like contracts about the sale of goods and brings the problem back to the unacceptable situation of selling children.³⁴

Interpreting the standard of performance in a similar way to other human labour contracts seems to cause serious problems for the surrogate's autonomy. This is a first indication that Anderson is right in stating that surrogacy needs to be treated differently from other human labour. In the next two paragraphs I will discuss the other two contract elements if the standard of performance is defined as 'delivering an acceptable child' to see the implications this can have. In chapter two I argue for a different interpretation of the standard of performance for surrogacy that does respect the surrogate's autonomy.

³⁰ Ethical concerns about designer babies in relation to surrogacy are outside the scope of this paper. More information about concerns about designer children in a surrogacy market can be found at: Debora L. Spar, "Designing babies", In: *The baby business: how money, science, and politics drive the commerce of conception* (Boston, Massachusetts: Harvard business school press, 2006), 97-127. + Anderson. "Is women's labor a commodity, 76.

³¹ Debora L. Spar, "Designing babies", In: *The baby business: how money, science, and politics drive the commerce of conception* (Boston, Massachusetts: Harvard business school press, 2006), 97-127.

³² Wilkinson, *Bodies for sale*, 179.

³³ Horner, "My Child, Your Womb, Our Contract", 145.

³⁴ Idem

§1.2 Checking the standard of performance

The second element of contracts to discuss is checking the standard of performance. When the goal of surrogacy is to have a healthy, or an acceptable child, the wellbeing of this child needs to be a priority. Signing the contract also means that the surrogate is accepting a responsibility for a potential life. Making sure that the surrogate is fulfilling this part of the contract in an ethical way can be complicated. When the standard of performance is defined as 'delivering an acceptable child', everything will be done to make sure that the fetus has the best chance to develop. As argued in the previous paragraph this can be used as an argument to give the intended parents control over the surrogate and therefore limit her autonomy.

An example of what this control can look like in a surrogacy context can be found in transnational surrogacy markets. Before the transnational surrogacy market in India was called to a halt in 2015 the intended parents, who often lived abroad, were guaranteed that the standard of performance was met because the surrogates lived together in special surrogacy hostels.³⁵ These hostels were presented as a home for surrogates where they could learn new skills and connect with other surrogates, but it was a structure that was put in place to justify the surveillance of surrogates.³⁶ Beauchamp and Childress state that in order to act autonomously you need to be able to "act intentionally, with understanding and without controlling influences".³⁷ A surrogacy hostel goes against all three points as constant surveillance takes away all freedom from surrogates to make their own decisions.

§1.3 Contract breach and consequences

The last element of a contract is the question what to do if the standard of performance is not met and therefore the contract is breached. Generally with a business contract a central consequence of a breach of contract is monetary compensation to return to the

³⁵ The transnational surrogacy market in India was called to a halt in 2015, because of several ethical issues including exploitation problems and several cases of abandoned surrogacy children and the deaths of surrogates for whom nobody took responsibility. More information about this can be found at: Amrita Pande, "Cross-Border Reproductive Surrogacy in India.", In: *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues*, ed. E. Scott Sills, (Cambridge: Cambridge University Press, 2016), 144.
DOI:10.1017/CBO9781316282618.020.

³⁶ Amrita Pande, "Commercial surrogacy in India: Manufacturing a perfect mother-worker." *Signs: Journal of women in culture and society* 35.4 (2010): 983.

³⁷ Beauchamp and Childress, *Principles of Biomedical Ethics*, 58.

status quo before the contract was breached.³⁸ In the case of surrogacy this will never be an acceptable approach as there is a fetus or a child involved and taking away the autonomy of the surrogate can never be compensated with money as it is too important. Therefore there is no way to return to the situation before the contract was breached.

Looking at these three elements of a contract in relation to surrogacy means that Anderson is right in stating that if a surrogacy contract is treated as any other contract this can take away the surrogate's autonomy. The standard approach of stating that making the autonomous decision to sign the contract is what is needed to make the contract valid, is not enough for surrogacy. What makes surrogacy different is that it is important that the surrogate remains autonomous for the entire surrogacy process, in order to protect her right to bodily integrity. If we want to accept surrogacy contracts signing them should not only be an autonomous decision, it also needs to be part of the contract that the surrogate remains an autonomous agent during the surrogacy process. The intended parents or the contract itself should never be able to force a surrogate into any procedures or tests that she is not agreeing to.

In the next chapter I will propose a different approach to a surrogacy contract where the surrogate's autonomy is secured in the contract by redefining the standard of performance. In chapter three and four I will discuss four further common arguments against the use of a surrogacy contract to argue that under this approach and several specific circumstances, a surrogacy contract will be preferable over altruistic surrogacy that is currently the standard in The Netherlands.

³⁸ "Consequences of Breaking a Contract", upcounsel, June 12, 2022, <https://www.upcounsel.com/consequences-of-breaking-a-contract#:~:text=Under%20the%20law%2C%20once%20a,if%20the%20breach%20never%20happened.>

2. Adapting the contract for surrogacy

The main issue with a surrogacy contract that was raised in chapter one regards to setting the standard of performance as 'an acceptable child' can be used as an argument to give the intended parents control over the surrogate and limit her autonomy. This lead to the conclusion that a surrogacy contract needs to be treated differently from contracts for other human labour in order to respect the surrogate's autonomy.

I will start this chapter by redefining the three elements of a contract that were discussed in chapter one: the standard of performance (§2.1), checking if this standard is met (§2.2) and the consequences of a breach of contract (§2.3). In the last paragraph of this chapter I will propose using the distinction between the responsibility for a fetus and a child to secure the surrogate's autonomy in a surrogacy contract, while also retaining the benefits a contract provides the intended parents. Separating this responsibility will take away the "justification" from the intended parents to control the surrogate.

§2.1 Standard of performance for surrogacy

As discussed in chapter one using a sale of goods approach to set the standard of performance for surrogacy is not an ethical option as it can be used by the intended parents to justify limiting the surrogate's autonomy. Another approach to set the standard of performance is by making the distinction between a sufficient and an insufficient performance. However, Horner states that the essence of surrogacy is to deliver an acceptable child.³⁹ This leads her to conclude that surrogacy contracts are a lot like contracts about the sale of goods, in this case selling children.⁴⁰ I have a problem with how Horner defines the essence of surrogacy. I agree that for all parties involved the goal, at least at the start of this process, is to have a healthy child. 'Healthy' can be an ambiguous term and Horner's choice to refer to the child as acceptable is therefore understandable. But to have a healthy, or an acceptable, child is also the goal with natural pregnancies and even with adoption. How can it then be the *essence* of surrogacy?

Surrogacy is not a process that stands on its own: it is often referred to as a treatment for infertility. The golden standard that surrogacy is modelled after, is a natural pregnancy. Maybe it can be stated that the essence of a natural pregnancy is to have an acceptable child. What makes surrogacy unique is that it gives couples who are

³⁹ Horner, "My Child, Your Womb, Our Contract", 145.

⁴⁰ Idem.

not able to gestate a child themselves a chance to have a child. I see this as the essence of surrogacy and the key word here is *chance*. If the standard is a natural pregnancy, there are no guarantees about the child you will receive that way either. Then why would we expect this with gestational surrogacy? Not even the gestational world is as manipulable as we maybe would like to think. In regards to answering the question when the surrogate has done enough to meet the requirements of the contract this means the surrogate is required to give the intended parents a fair chance to become parents by offering gestational labour. Defining the standard of performance like this opens up the dilemma of defining 'a fair chance'.

In response to the question how to draw a line between the ability to make an autonomous decision and not being able to anymore, Beauchamp and Childress state that this is also related to specific situations. Rarely anyone is incapable of making autonomous decisions about all aspects of their life.⁴¹ It is important to recognise that only general criteria can be established for when the option of making an autonomous decision is limited as there often is no clear line between controlling and noncontrolling influences.⁴² A similar approach will be needed to define 'a fair chance'. Some limits are easy to set, like that giving a fair chance should also mean that it is fair towards to surrogate. This could mean, for example, that she has to be able to remain an autonomous agent while working as a surrogate. Other limits will be more dependent on the specific relationship between the surrogate and the intended parents. In the next paragraph I will discuss the second element of how we use contracts: how far can we go in checking if this standard of performance is met?

§2.2 Checking the standard of performance with surrogacy

If the standard of performance is a product, as was argued in chapter one, surveillance will do no harm as a product has no autonomy that could be harmed. For surrogacy this is not a valid option. Using a surrogacy hostel to watch the surrogate can reassure the intended parents that the fetus is being cared for. However, taking away the surrogate's autonomy in this way is not fair to her. Watching and controlling the surrogate constantly during her pregnancy is the only way to know for sure if she is providing the best environment for the fetus to develop. This is however not usually the accepted approach in a contract for human labour.

In the previous paragraph the standard of performance was set as giving the intended parents a fair chance of parenthood by offering gestational labour. By defining

⁴¹ Beauchamp and Childress, *Principles of Biomedical Ethics*, 72.

⁴² Idem, 95.

the standard of performance this way this is no longer a sale of goods contract approach, but it is about a sufficient or insufficient performance. Making this step away from a sale of goods approach means stepping away from the idea that a surrogacy market is actually a market to sell babies and using this as a justification to harm the surrogate's autonomy.

This leaves the question about how this new standard of performance should be checked. In chapter one it was stated that as altruistic surrogacy mostly depends on trust between the surrogate and the intended parents, this trust is with a surrogacy market at least partially replaced with a contract. This does not mean it will be possible to fully replace the trust, on which surrogacy arrangements are currently build, with contracts and legal power. Checking if the standard of performance is met in surrogacy is often about following behaviour restrictions. Some examples of behaviour restrictions that could be part of a surrogacy contract are not smoking, not drinking any alcohol, plenty of rest, not eating specific foods, etc. These are all restrictions that are put in place to protect the fetus and these restrictions are medical recommendations for all pregnant people, not just surrogates. In sports law it has been normalised to put behaviour restrictions, similar to these, in morality clauses that are part of the contract.⁴³ A clause like this in a sport contract can be a way for companies to give them grounds to break the contract when an athlete embarrasses them or risks the future of their team by behaving in a way that impairs their performance.⁴⁴ Unlike the surrogates in a surrogacy market in India, professional athletes are not watched all day to make sure they always comply with the contract. This is not seen as a reason to make their contract invalid or exclude something like dietary restrictions from these contracts. Therefore the intended parents should not be able to making a constant surveillance of the surrogates behaviour part of the contract. The first added element to the standard of performance as a fair chance of parenthood, is that trust between the surrogate and the intended parents remains important in a surrogacy market, not just with altruistic surrogacy.

§2.3 Contract breach and consequences with surrogacy

The last contract element that still needs to be discussed is when the contract is breached and what the consequences should be when this happens. The standard of performance, giving the intended parents a fair chance of parenthood by offering

⁴³ Patricia Sanchez Abril and Nicholas Greene, "Contracting Correctness: A Rubric for Analyzing Morality Clauses," *Washington and Lee Law Review* 74, no. 1 (2017): 10, <https://heinonline.org/HOL/P?h=hein.journals/waslee74&i=19> (accessed May 31, 2022).

⁴⁴ *Idem*, 12.

gestational labour, was set by making the distinction between a sufficient and an insufficient performance. This means that the contract is breached when the surrogate has not given the intended parents a fair chance of parenthood. As discussed in paragraph 2.1 it is difficult to pin point when the contract is breached as this is partly dependent on the relationship between the surrogate and the intended parents. Following the sport contract example, with athletes social media can be used to show that someone is in breach of contract as they have repeatedly ignored the dietary restrictions for example.⁴⁵ A similar approach can be used for surrogates. If in some way it becomes clear that the surrogate has repeatedly ignored the behaviour restrictions it can be concluded that the contract is no longer valid. A consequence of this can be that when this happens the intended parents have the right to return the parental rights to the surrogate before the birth of the child and they will no longer be responsible for this child. The implications of considering this as a consequence of a breach of contract will be discussed in paragraph 3.3.

Defining the standard of performance for a surrogacy contract as giving the intended parents a fair chance of parenthood addresses the concerns that a surrogacy contract has to be interpreted as a contract to sell children. This approach leaves room for personalisation of the contract to match the specific requests from the surrogate and the intended parents. This is in line with Beauchamp's and Childress' view of autonomy, that there can never be a strict line drawn between the ability and inability to make an autonomous decision as this is dependent on specific circumstances. This flexibility is an important element of respecting the surrogate's autonomy in a surrogacy market. However, there are situations where it is very clear what action needs to be taken to protect the surrogate's autonomy in this process. An example of this is the question to terminate the pregnancy or not. In the next paragraph the distinction between a fetus and a child and the abortion example will be used to discuss four scenarios where the intended parents and the surrogate might disagree. These scenarios will be the base of the proposal of how surrogacy contracts can be used while respecting the surrogate's autonomy.

⁴⁵ Abril and Green, "Contracting Correctness: A Rubric for Analyzing Morality Clauses – clause: create a scandal", 42 + 49.

§2.4 Responsibility: fetus and child distinction

If a natural pregnancy is the example we are modelling surrogacy after, the main difference is that the surrogate is not the intended parent with surrogacy, something that is usually the case with a natural pregnancy. With a natural pregnancy one person is responsible for both the fetus and the child whereas with surrogacy this responsibility is split. This is why the difference between a fetus and a child is very relevant for the surrogacy debate. The birth can be seen as the moment that the fetus becomes a child. Many arguments can be made about this transition, but in this thesis I will not get into the differences of identity, but focus on the transition in the relation to the surrogate and the legal parents.⁴⁶ This is why the surrogate should be responsible for the fetus and the intended parents should be responsible for the child.

The starting point for adapting how we approach a surrogacy contract is to make sure the surrogate remains an autonomous agent during the pregnancy. This argument is only valid as long as the surrogate is carrying the fetus. As this idea is built on the desire to make sure that the surrogate remains autonomous during the pregnancy it is important to recognise that there is another side to this. As stated in chapter one, the view that was introduced in the nineteenth century that you have no right to complain about a loss of freedom if signing a contract was an autonomous decision, can cause problems for surrogacy as the goal is that the surrogate remains autonomous for the duration of the full surrogacy process.⁴⁷ This should not mean that the autonomous choice to sign the contract has no value. The contract should not only protect the surrogate, but also the intended parents. In exchange for accepting that the surrogate can make decisions about her own body, the contract gives the intended parents extra security that the surrogate will indeed give them the child as they are responsible from that moment forward.

One of the main examples of a surrogate's autonomy being harmed is when the choice to terminate her pregnancy is taken away from her or when her right to bodily integrity is harmed, because of limited autonomy, and she is forced to terminate the pregnancy. If we want to respect the surrogate's right to bodily integrity, she needs to remain an autonomous agent throughout the pregnancy. It is her body and as long as she is carrying the fetus this means that she has the final say about what happens to this fetus. If she wants to abort the fetus against the wishes of the intended parents, this is her right. This is based on the law 'termination of pregnancy' (wet afbreking zwangerschap) that includes the circumstances under which an abortion is legal in The

⁴⁶ More information about the identity debate around the distinction between a fetus and a child can be found at: Eric T. Olson, "Was I Ever a Fetus?" *Philosophy and Phenomenological Research* 57, no. 1 (1997): 95–110.

⁴⁷ Nolan, *Capitalism and Freedom: the contradictory character of globalisation*, 13.

Netherlands.⁴⁸ As the right to terminate a pregnancy is such an important issue regarding the surrogate’s autonomy I will use this as an example to explain the effect of the fetus-child responsibility distinction. Taking abortion as an example this leads to four scenario’s, that are explained in figure 1, where the surrogate and the intended parents might disagree and the action that follows if we accept this approach based on the distinction between a fetus and a child.

Four scenario’s

	Surrogate	Intended parents	Decision
1	Wants to abort the fetus	Do not want to abort the fetus	Surrogate wins
2	Wants to keep the child	Want to keep the baby	Intended parents win
3	Does not want to abort the fetus	Want to abort the fetus	Surrogate wins
4	Does not want to keep the child	Do not want to keep the child	Surrogate wins. Intended parents are the parents

Figure 1: four scenario’s before and after birth

The first two scenario’s keep a clear balance between the value of the contract while respecting the surrogate’s autonomy. It gets complicated from scenario three on. If this scenario plays out it most likely means a child will be born. This can lead to scenario four, where neither the surrogate or the intended parents want to keep the child. Following the fetus-child responsibility distinction, the intended parents are the legal parents and are therefore responsible for the child. Their desire to have a child sets the surrogacy process in motion. This autonomous choice was leading when they signed the surrogacy contract, knowing they were giving up the right to abort the child.

What complicates this situation is that as a legal parent, you have the right to give up your child for adoption. Restricting this right or trying to limit it for children born through surrogacy will introduce a very slippery slope that can lead to a lot of harm. Not restricting it can also cause serious harm and it can lead to an overload of the adoption system. Especially if surrogacy leads to a lot of unwanted children, e.g. special needs children, who are all put up for adoption until the intended parents get a child that does meet their expectations. A way to deal with this is accepting that the intended parents can give up their child for adoption, but that this will mean they cannot enter into another surrogacy contract. Unfortunately this might motivate intended parents to go abroad for surrogacy again. This possible negative effect should not be a reason to ban surrogacy contracts completely in The Netherlands. Doing this will not stop any intended

⁴⁸ “Wet afbreking zwangerschap”, July 1, 2021. Retrieved from: <http://deeplinking.kluwer.nl/?param=00D63AC0&cpid=WKNL-LTR-Nav2> (accessed June 4, 2022).

parents from going abroad for surrogacy. Meaning that the practice will continue anyway, only outside of Dutch borders and Dutch regulation. Finding a balance between the currently accepted form of altruistic surrogacy and a regulated surrogacy market does not mean a balance can be found between the many different international views on surrogacy. Improving the legislation in The Netherlands will probably never convince all intended parents to stay here for a surrogacy process. However, not making a choice and indirectly accepting transnational surrogacy markets will most likely not persuade intended parents who are now choosing to travel abroad to build their family, to stay in The Netherlands.

Surrogacy is a chance to add a child to your family, not a guarantee and not something that should be taken for granted. This is why I defined the standard of performance for a surrogacy contract as giving intended parents a fair chance of parenthood. By contractually separation the responsibility for the fetus and the child the surrogate remains autonomous during the surrogacy process while the intended parents get the extra security that the surrogate will indeed give them the child as they are responsible from that moment forward. This responsibility separation also takes away the reason from the intended parents to justify limiting the surrogate's autonomy. Surrogacy should not be any different from a natural pregnancy in the sense that you cannot choose the child you will receive. This does not mean no precautions should be taken to avoid the fourth scenario from figure 1. What precautions this should be exactly is outside the scope of this thesis, but one element that could play a significant role in this, is discussing several 'what-if scenario's'. A good match between a potential surrogate and intended parents is characterised by shared values that are relevant during pregnancy like prenatal care, abortion, genetic testing, etc. Discussing a diverse sets of what-if scenario's that are relevant are a useful tool to check if the potential surrogate and intended parents are a good value match.

In the next two chapters I will discuss four further common arguments against a surrogacy market, because of the influence this can have on the surrogate's autonomy. In chapter three I will focus on two arguments on a personal level, about the surrogate herself (§3.1) and the bond she may develop with the fetus (§3.2). I will argue that the assumptions about this bond are based on a biological bias and that if this bond will be accepted as a valid reason to ignore an autonomously signed contract, harmful stereotypes and prejudices of women will be reinforced. The last argument of this chapter is on a contract level and deals with the concern that before conception the surrogate cannot predict how she will feel after the child is born (§3.3). It is argued that this lack of understanding will limit the surrogate's autonomy. I will use the example of an advance directive to argue that this does not have to be the case.

3. Can a surrogacy contract respect autonomy?

In this chapter I will focus on three arguments against surrogacy markets, because of the influence this can have on the surrogate's autonomy. These arguments have been discussed by many authors in different forms and have been related to each other in different ways. I will focus on the interpretations of Elizabeth Anderson and Carolyn McLeod.

The first two arguments are on a personal level, about the surrogate's identity (§3.1) and the bond she may develop with the fetus (§3.2). I will argue that women's identity should not be defined by her reproductive abilities. Second, I will argue that the assumptions about this potential bond are based on a biological bias and that if this potential bond will be accepted as a valid reason to ignore an autonomously signed contract, stereotypes and prejudices of women will be reinforced. Third, I will argue that it is not desirable to give the surrogate the contractual freedom to change her mind and take parental rights after the birth of the child she carried. This has some impact on the consequence of a breach of contract, as stated in chapter two, that when the surrogate breaches the contract repeatedly, this should mean that the intended parents gain the right to give up their parental rights to the surrogate. This will be discussed in paragraph 3.2.3. The third argument, and last of this chapter, is on a contract level and deals with the concern that before conception the surrogate cannot predict how she will feel after the child is born (§3.3). It is argued that this lack of understanding will limit the surrogate's autonomy.^{49 50} I will use the example of an advance directive to argue that this does not have to be the case.

§3.1 Identity and reproductive abilities

Surrogacy is a practice where someone's sex plays a significant role. Only people with a functioning uterus have the option of becoming a surrogate, as most of these people identify as female, surrogacy debates are strongly influenced by feminist views and the differences in an unequal society. An argument against a surrogacy market is the idea that women's reproductive abilities are closely tied to their identity and therefore surrogacy is a degrading practice.⁵¹ Carole Pateman even states that a woman's

⁴⁹ Carolyn McLeod, "For dignity or money: feminists on the commodification of women's reproductive labour." In: *The Oxford Handbook of Bioethics*, ed. Bonnie Steinbock (Oxford: Oxford University Press, 2007): 269. DOI: 10.1093/oxfordhb/9780199562411.003.0012

⁵⁰ Jessica Munyon, "Protection and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions." *Suffolk UL Rev.* 36 (2002), 727. <https://heinonline.org/HOL/P?h=hein:journals/sufflr36&i=725> (accessed June 13, 2022).

⁵¹ McLeod, "For dignity or money," 274-275.

reproductive abilities are so closely connected to her identity that when she sells this, she is selling part of herself.⁵² For many authors statements about this connection between identity and reproductive ability seem to be sufficiently obvious and are therefore rarely properly argued.⁵³ If we argue from the assumption that reproductive ability is part of a woman's identity, selling this ability can only be justified by assuming that she was not able to act autonomously as otherwise she would not give up part of her identity. I believe however that this assumption about the relation between reproduction and identity is wrong and therefore this is not limiting women's autonomy and it is not a valid argument against a surrogacy market. If we accept this idea of a strong connection between reproductive abilities and identity this would mean accepting a very specific idea of womanhood. What would this perspective mean for women who are infertile for any reason? For those women who choose not to have children? For women for whom it would be dangerous to carry a child for medical reasons? For women who want to be a mother, but for whatever reason cannot? What would this mean for the mothers who adopted their child, who provided a safe home and love to a child who could not get this from their biological mother? If we accept this strong connection between reproduction and a woman's identity are these women not really women?

Historically women were mostly seen (and sometimes and some places still are) as gestators.⁵⁴ The effect of this idea of a close connection between womanhood and reproductive abilities is still a part of our society. Abortion rights are still being fought and women's autonomous choice not to procreate is often not respected.⁵⁵ Making the choice to become a parent is usually just accepted, whereas the choice not to become a parent is constantly questioned or it is assumed that she is not able to carry a child or that she will change her mind.⁵⁶ This shows that her ability to make the autonomous choice not to procreate is often not respected. Valuing the labour of child bearing is important, however having a uterus or exercising your capacity to gestate and give birth does not make you a better human being as Christine Overall rightly argues.⁵⁷ Gestation is part of a child's life and this phase can have a significant impact on the fetus and later the child, however it is not more important or significant than how a child is cared for and raised during their life.⁵⁸

⁵² Carole Pateman, *The sexual contract*, (Cambridge: Polity Press, 1988), 207.

⁵³ McLeod, "For dignity or money," 275

⁵⁴ Claudia Card, "Against Marriage and Motherhood." *Hypatia* 11, no. 3 (1996): 4.
<https://doi.org/10.1111/j.1527-2001.1996.tb01013.x>

⁵⁵ Christine Overall, *Why Have Children?: The Ethical Debate*, (Cambridge, Massachusetts: The MIT Press, 2012), 21.

⁵⁶ *Idem*, 2.

⁵⁷ Christine Overall, "What is the value of procreation?," In: *Family-making: contemporary ethical challenges*, ed. François Baylis and Carolyn McLeod, (Oxford: Oxford university press, 2014), 91.

⁵⁸ *Idem*, 91.

There are other forms of human labour that can be seen as part of our identities. A book can be closely related to the writer's identity, a painting can be related to the artist and a rabbi or a priest may see religion as a central element of their identity.⁵⁹ The writer will still accept payment for the book, the artist for the painting and the rabbi or priest for their religious services, and no one would object to this or see this as degrading.⁶⁰ Seeing reproductive abilities as an essential part of a woman's identity not only excludes a lot of women, but it also means a return to the idea that women are nothing more than gestators. While opponents of a surrogacy market are trying to prevent this, by taking away the option from women to accept a commercial surrogacy contract, they are taking away their chance to make an autonomous choice about their reproductive abilities. Just because historically men have connected womanhood to women's reproductive abilities does not mean they are intrinsically connected. It is unfair to women to define them by their reproductive abilities or inabilities.

§3.2 Bond between surrogate and fetus

The second argument on a personal level against a surrogacy market that I will discuss in this chapter is about the bond that may develop between the surrogate and the fetus during gestation. When talking about this bond it is important to realise that this is about a one-sided relationship. There is not enough data, to my knowledge, to make any statement about a possible connection a child will feel later in life with their gestator. So when discussing this bond between a surrogate and a fetus, this is only about the connection that the surrogate feels with the fetus. Another important clarification is that a bond between gestator and fetus is not a topic that is specifically about surrogacy. However, there is a relevant difference between a natural pregnancy and surrogacy in relation to this bond and this is the reason I am discussing it in this chapter and in relation to autonomy. With a natural pregnancy a bond between gestator and fetus is encouraged and celebrated, while with surrogacy this is not the case. Anderson makes the argument that the surrogate's autonomy is limited, because the contract acts as a controlling factor that prevents the surrogate from developing a bond with the fetus she is carrying.⁶¹ There are three elements to this argument that I will discuss. First I will argue that there are other factors that could limit the surrogate's autonomy that are now interpreted as the result of a gestational bond. With this I will show that the chances of a

⁵⁹ Debra Satz, "Markets in Women's Reproductive Labor," *Philosophy & Public Affairs*, Vol. 21, No. 2 (Spring 1992), 114-115. <https://www.jstor.org/stable/2265229> (accessed June 12, 2022).

⁶⁰ Idem, 114-115.

⁶¹ Anderson, "Is Women's Labor a Commodity?," 82+ 87.

gestational bond developing and influencing the surrogate's autonomy are not as great as Anderson presents it to be (§3.2.1). Second, I will argue that if a bond develops this should not overrule the contract as this leads to accepting reproductive essentialism (§3.2.2). Third, I will discuss the option that the surrogate has bonded with the fetus and what to do if she wants parental rights because of this (§3.2.3).

§3.2.1 The gestational bond may not develop

The idea that the surrogate will bond with the fetus unless she actively prevents this connection from forming stems from the assumption that all women will bond with the fetus they are carrying. The fact that there are women who choose to have an abortion or give their child up for adoption shows that not all women experience a bond with the fetus, at the very least not a bond that is strong enough not to want to give the fetus or child up. Therefore, Dr. Carolyn McLeod, whose expertise is in applied ethics and feminist philosophy, argues that Anderson's autonomy thesis should be rephrased as gestational mothers *may* bond with the fetus, because they care for the fetus for nine months.⁶² This is a weaker version of Anderson's autonomy thesis that states that women *will* bond with the fetus they are carrying.⁶³ In this paragraph I will explain two structures that support McLeod's version of the autonomy thesis: the biological bias and societal structures.

The biological connection between a fetus and a mother, can be split into a gestational connection (surrogate) and a genetic connection (intended and biological mother⁶⁴). The idea that a woman will bond with a fetus she is carrying, even when there is no genetic connection between them like with surrogacy, has a base in the biological bias. This bias goes further than stating that biological family-making is the norm, it presumes that this is superior to other forms of family-making, like surrogacy.⁶⁵ This bias plays a significant role in our society where straight couples are favoured over same-sex couples in adoption procedures and the assumption that adopted children will be traumatised for being separated from their biological mother.⁶⁶ From this perspective the gestational biological connection between the surrogate and the fetus can be seen as a

⁶² McLeod, "For dignity or money," 276.

⁶³ Anderson, "Is Women's Labor a Commodity?," 89-90.

⁶⁴ In this situation the biological mother is also the genetic mother. If an eggdonor is used in the surrogacy process this connection is split even further.

⁶⁵ Julie Crawford, "On non-biological maternity, or "My daughter is going to be a father!"" In: *Family-making: contemporary ethical challenges*, ed. François Baylis and Carolyn McLeod, (Oxford: Oxford university press, 2014), 174.

⁶⁶ Crawford, "On non-biological maternity, or "My daughter is going to be a father!"," 174.

controlling influence that limits the surrogate's autonomy. There is however, no definitive scientific evidence of gestational bonding that could limit the surrogate's autonomy.⁶⁷

Many people including psychologists, psychiatrists and developmental biologists believe that a bond does develop between gestator and the fetus she is carrying.⁶⁸ An argument given for this is the grief reaction, feelings of loss and feelings of guilt when a child is stillborn, after infant death or a miscarriage.⁶⁹ What is overlooked in this argument is that the women who are referred to in this study wanted a child and were probably looking forward to meeting their child. The grief of losing that child cannot just be explained by a potential gestational bond, but also the loss of a life and future that was imagined. If the gestational bond was the only reason this loss was felt, men would never grieve the loss of their child.

There also have been studies about the feelings of loss and guilt that women experience when they give their child up for adoption.⁷⁰ This has been interpreted to state that gestational surrogacy can do harm to surrogates.⁷¹ First, the act of giving up your child for adoption is often one that is done with the best interest of the child in mind, that does not mean it is an easy choice or an unemotional one.⁷² Second, giving a child up for adoption might not always be an autonomous choice that is made by the birthparents. In a research project where 72 birth parents or grandparents were asked six years after they gave up their child for adoption how they looked back on the adoption.⁷³ When asked how they felt now, many birth parents reported that they still experienced feelings of anger.⁷⁴ The main reason for this that they stated was that they felt "forced" into the adoption by social services, family, life circumstance, or their own failings".⁷⁵ This raises questions about the comparison of adoption experiences with gestational surrogacy in regards to the ability to make autonomous decisions that are outside the scope of this thesis. Important to note is that not a lot less research has been

⁶⁷ Research has shown that during gestation there is a transfer of cells between the gestator and the fetus during gestation, both in a natural pregnancy and surrogacy. Right now a lot is unknown about how this can influence a surrogate and a child later in life as these cells can remain in the body for a long time. Therefore currently, no solid argument can be built to state that this cell transfer influences the surrogate's autonomy or not and I will not discuss this further in this thesis. More information can be found at: Ruth L. Fischbach & John D. Loike (2014) Maternal–Fetal Cell Transfer in Surrogacy: Ties That Bind, *The American Journal of Bioethics*, 14:5, 35-36, DOI: 10.1080/15265161.2014.892179 and Margrit Schildrick, "Maternal–Fetal Microchimerism and Genetic Origins: Some Socio-legal Implications." *Science, Technology, & Human Values* (2022), DOI: 01622439221090686

⁶⁸ Rosalie Ber, "Ethical Issues in Gestational Surrogacy," In: *Theoretical Medicine and Bioethics: Philosophy of Medical Research and Practice* 21, no. 2 (2000), 158, <https://doi.org/10.1023/A:1009956218800>

⁶⁹ Idem

⁷⁰ Idem.

⁷¹ Idem.

⁷² Ber, "Ethical Issues in Gestational Surrogacy," 161-162.

⁷³ Elsbeth Neil "Coming to Terms with the Loss of a Child: The Feelings of Birth Parents and Grandparents About Adoption and Post-Adoption Contact", *Adoption Quarterly*, 10, 1: 14. DOI: 10.1300/J145v10n01_01

⁷⁴ Idem.

⁷⁵ Idem.

done specifically about the experiences of gestational surrogates and reports of surrogates experiencing feelings of loss or regret can often be explained by other factors than a gestational bond, like unmet expectations in the contact with the intended parents and actions like not receiving a photo of the child.⁷⁶

The second structure to discuss is based in society and how societal structures can confirm prejudice about women. If we assume that there is a gestational bond between gestator and fetus it could be used to explain, also in natural pregnancies, the prejudice that women are better caretakers and better parents than men. However, this is a prejudice that can much easier be explained by societies expectations and the unequal treatment of women. Right now the partner of a new mother gets one week of paid leave after the birth of their child.⁷⁷ Therefore after one week she is often left alone to take care of the newborn. This means she is the one getting a crash course in taking care of the child with valuable lessons that her partner is missing out on. In these first few weeks patterns are established that will confirm the prejudice that women are better caretakers and better parents than men. This has also been the root of resistance against gay parenthood, that is based on the idea that two men would not be able to take care of a child as well as a woman. Despite many attempts to proof this, research shows that two men are just as capable as women of taking care of a child together.^{78 79 80}

These examples show that a gestational bond is not as natural as it often is presented. Some women may develop a bond with the fetus, but it does not have to. This can be true for both natural as surrogacy pregnancies. This limits the impact this bond can have on the surrogates autonomy as not all surrogates will feel like the contract is a factor that is controlling their feelings towards the fetus.

§3.2.2 The effects of a gestational bond overruling the contract

In the previous paragraph I argued that the chances of a gestational bond developing and influencing the surrogate's autonomy are smaller than often presented in the

⁷⁶ Golombok, *We Are Family*, 86.

⁷⁷ Starting the second of August a new European guideline will give new parents nine weeks of partially paid parental leave. Time will tell how this will effect young families and parenting roles and if people feel free to actually take this time off.

⁷⁸ Sean Cahill and Sarah Tobias. *Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Families*. Upcc Book Collections on Project Muse, (Ann Arbor: University of Michigan Press, 2007), 12-15. Retrieved from: https://search-ebSCOhost-com.proxy.library.uu.nl/login.aspx?direct=true&db=nlebk&AN=328975&site=ehost-live&ebv=EB&ppid=pp_15

⁷⁹ Dorothy A. Greenfeld and Emre Seli. "Assisted reproduction in same sex couples," In: *Bioethics: An Anthology (Third edition.)*, (Chichester, West Sussex: John Wiley & Sons, 2016), 76. Retrieved from: <https://ebookcentral.proquest.com/lib/uunl/reader.action?docID=4042986&ppg=94>

⁸⁰ Blake, "The families of assisted reproduction and adoption," 71-73 + 76-77.

surrogacy debate. However, a gestational bond might still develop and therefore it might have an impact on the surrogate's autonomy. In this paragraph I will briefly discuss the question if it would be an option to accept choices made by the surrogate because of a gestational bond as autonomous choices that need to be respected.

There are three ways to approach this assuming that the surrogate has bonded with the fetus. First, accepting that choices made based on the experienced bond are not autonomous, but this would be a very paternalistic approach. This view would be built on the prejudice that women can get so overwhelmed by their feelings that they lose all ability to make autonomous decisions.⁸¹ If I would accept this there would be no point in writing about a regulated surrogacy market to protect women's autonomy. The second option is to state that her choices made based on the experienced bond with the fetus are autonomous and they should overrule every other decision and the contract. The third option is recognising the choices as autonomous, but not allowing this to overrule previously made decisions. I believe this last option is the best approach in this case.

Lawyer Marjorie Shultz has written a lot about contract law in relation to reproductive technologies. She states that by accepting that the surrogate is the one party in the surrogacy agreement who can change her mind after birth, despite the contract, reinforces stereotypes of women and motherhood.⁸² This view encourages the idea that women are unstable and controlled by their hormones and emotions.⁸³ If the law accepts this view this is an expression of the idea that the gestational experience can overrule all other considerations, because of maternal bonding.⁸⁴ This would also mean accepting the restricting view of reproductive essentialism, stating that women are maternal by nature and that gender is defined by biology. This would be unfair to women as identity is about more than reproductive abilities as argued in paragraph 3.1. Giving a surrogate the contractual freedom to change her mind and taking parental rights, because she feels connected to the fetus would therefore not be a desirable situation.

Based on Shultz's argumentation I believe autonomous choices from the surrogate because of a gestational bond should not overrule the contract, because it will harm women's autonomy more to allow this. Societal structures and confirmed prejudices can be seen as a controlling factor, more than a gestational bond can, as argued in the previous paragraph. If a bond is formed between the surrogate and the fetus this does not have to mean it is strong enough that she wants to parent the child. This does not fully exclude the option of a strong bond forming and this scenario and its implications will be addressed in the next paragraph.

⁸¹ Lieber, "Selling the womb: can the feminist critique of surrogacy be answered," 216.

⁸² Marjorie Maguire Shultz, "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality," *Wisconsin Law Review*, no. 2 (1990), 383-384.

⁸³ *Idem*, 384.

⁸⁴ *Idem*.

§3.2.3 What if the surrogate wants parental rights?

In the previous paragraph I argued that the surrogate should not get the contractual freedom to change her mind and take parental rights after the birth of the child she carried. This can be complicated by the adaption to the contract to make it suitable for surrogacy that was proposed in paragraph 2.3: giving the intended parents the option to give parental rights to the surrogate, if the surrogate has repeatedly broken the behaviour restrictions that were put in place for the benefit of the fetus. If the surrogate has bonded with the fetus and wants to gain parental rights she can attempt to get these by repeatedly breaching the contract.

There are two important clarifications to make regarding this element of the contract. First, this situation is specially about the pregnancy and therefore about the fetus. Once childbirth has started the responsibility switch from the surrogate to the intended parents has started and the intended parents need to take responsibility for their child. Second, the intended parents should not gain the right to give up their parental rights until it has been confirmed that the surrogate has indeed breached the contract repeatedly. This is important, because otherwise the contract loses a lot of power in favour of the intended parents as the surrogate can still be forced to care for a child she never intended to parent. The contract is there to protect all parties involved, not just the intended parents. In order to make sure that the surrogacy market is regulated in a way that respects the surrogate's autonomy, the intended parents cannot have complete power over the surrogate during the pregnancy. However, this should not become more important than the wellbeing of the child. This means there need to be consequences for the surrogate if she acts in a way that could potentially harm the fetus and breaches the contract this way.

All policy is a balance between restricting and giving people freedom while accepting that this leaves open the possibility that people will abuse this freedom. No contract can fully exclude the possibility of difficult scenario's becoming a reality, but it will clarify beforehand how the situation will be handled and what rights all involved parties have at what point in the process.

§3.3 Predicting feelings

The third issue to discuss in this chapter is on a contract level. It is argued that women cannot enter into a contract freely to relinquish a child at birth before the child is

conceived as the woman will not know beforehand how she will feel in that moment.^{85 86} This argument is also phrased to say that the unpredictability of hormonal changes during pregnancy can cause a woman to change her mind.⁸⁷ This introduces two autonomy concerns about using a surrogacy contract: the time the contract remains valid and the impact of hormones on a woman's ability to make autonomous decisions.

I will start with the first concern: The time between signing a contract and the end of the contract is key here. One of the requirements to act autonomously as defined by Beauchamp and Childress is the ability to act with understanding and this seems to be questioned here.⁸⁸ Let's assume a surrogacy contract will be active for at least a year. It will be signed before conception, the medical process will take some time followed by nine months gestation, if all goes well. If we accept the statement that not being able to predict feelings makes a contract invalid, it will mean that any contract that influences people for at least a year should not remain valid. This would mean many different kinds of contracts that we use daily would indeed be invalid.

An example of such a contract is an advance directive. This can be drawn up at any point of your (adult) life to give specific instructions about, for example, medical care you want to or do not want to receive at a time when you are not able to make decisions for yourself due to injury or illness. This is an accepted way within a medical setting to make sure someone's right of self-determination is respected during a time when someone is not able to otherwise. Part of an advance directive can be about end of life care. For example, someone can include in this contract that when they are dependent on a ventilator to breath and physicians believe there is little to no change they will ever breath on their own again, they want this care to be withdrawn after 30 days. A physician then has to respect these wishes and allow the patient to die after this time period.⁸⁹ Advance directives are an accepted tool in the medical world, despite the knowledge that our perspectives about quality of life changes during our lifetime and are influenced by different life events.⁹⁰

An advance directive is based on expectations for a certain life and the quality of life we expect to experience during that time. Research has shown that there is a gap between the anticipated emotional response to future events and the actual response if

⁸⁵ McLeod, "For dignity or money," 269.

⁸⁶ Munyon, "Protection and Freedom of Contract," 727.

⁸⁷ Idem.

⁸⁸ Beauchamp and Childress, *Principles of Biomedical Ethics*, 58.

⁸⁹ Rijksoverheid, "Hoe schrijf ik een wilsverklaring", Rijksoverheid, July 4, 2022, <https://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/vraag-en-antwoord/wilsverklaring-opstellen>

⁹⁰ Laraine Winter, Miriam S. Moss, and Christine Hoffman, "Affective Forecasting and Advance Care Planning: Anticipating Quality of Life in Future Health Statuses," *Journal of Health Psychology* 14, no. 3 (April 2009), 448. DOI: 10.1177/1359105309102201

this event occurs.⁹¹ This gap is referred to as 'miswanting'.⁹² The current health status of people also influences miswanting. When healthy people are confronted with the prospect of a poorer health status they expect a lower quality of life and this results in requests for fewer life years. Requests that can be put in an advance directive, while people who make these decisions while they are already in a poorer health do not anticipate an unacceptable quality of life when confronted with the same scenario.⁹³ Despite this knowledge advance directives are recognised as valid contracts without a requirement for a yearly check if something needs to be changed for example.

An argument in favour of acting on the content of an advance directive is that everyone who writes one, knows that it is an important declaration that cannot easily be changed once someone becomes incompetent to make decisions for themselves.⁹⁴ This means an advance directive, in almost all circumstances, is written very intentionally and carefully and therefore it should be respected. If we respect a contract that can be written years before anyone needs to act on its content, then why should we not respect a surrogacy contract that is written with similar intentionality and care? An advance directive is a contract that is an accepted act of autonomy in itself, if the same care is taken writing a surrogacy contract it should also be respected as an autonomous act as there will be no lack of understanding to impact the woman's autonomy.

The second concern is about the impact of hormones on a woman's ability to make an autonomous decision. Here another condition for autonomy, as defined by Beauchamp and Childress, is seen as a risk: pregnancy hormones as a controlling influence on a woman's actions.⁹⁵ An important difference between an advance directive and a surrogacy contract is that the latter involves a surrogate, generally someone who identifies and is seen as a woman and an advance directive involves all genders. This suggests that the idea that women cannot enter into a surrogacy contract freely and their autonomy is influenced by hormones, is based on sexist prejudices and this is confirmed by history. The idea that women are unstable, too emotional and controlled by hormones especially during pregnancy, has been used by men for centuries to control women and make decisions for them.⁹⁶ Psychologist Joan Einwohner refers to the Victorian era to clarify this point. During this era women were given the status of dependent children who

⁹¹ Winter, "Affective Forecasting and Advance Care Planning", 448.

⁹² Idem.

⁹³ Winter, "Affective Forecasting and Advance Care Planning", 452.

⁹⁴ Craig Paterson, *Assisted Suicide and Euthanasia: A Natural Law Ethics Approach*, (Aldershot, England: Routledge, 2008), 145. <https://search-ebscohost-com.proxy.library.uu.nl/login.aspx?direct=true&db=nlebk&AN=269414&site=ehost-live> (accessed June 10, 2022).

⁹⁵ Beauchamp and Childress, *Principles of Biomedical Ethics*, 58.

⁹⁶ Katherine B. Lieber, "Selling the womb: can the feminist critique of surrogacy be answered," *Indiana Law Journal* 68, no. 1 (1992): 216, <https://heinonline.org/HOL/P?h=hein.journals/indana68&i=217> (accessed June 1, 2022).

could get so overwhelmed by their feelings during pregnancy and after giving birth that they needed to be protected from themselves.⁹⁷ When this kind of reasoning is used to argue that women are not able to freely sign a surrogacy contract, we step onto a slippery slope. This could lead to the argument that women are incapable of making decisions. That is a development we need to prevent. An important step in doing that is for women to take control by presenting viable and respectful reproductive legislation.

In this chapter have discussed three arguments against the use of surrogacy contracts. I have stated in paragraph 3.1 that defining women's identity by their gestational abilities is unfair and will exclude a lot of women. By taking the option away from women to accept a commercial surrogacy contract, chances are taken away from them to make autonomous decisions about their reproductive abilities. In order to create a surrogacy market that respects autonomy it is therefore important to keep this option open for those who want it. In paragraph 2.3 I have discussed that even if a surrogate bonds with the fetus she is carrying giving her the contractual freedom to change her mind and be granted parental rights, because of this bond is not desirable as this would mean accepting reproductive essentialism. The fetus-child responsibility distinction that was introduced in chapter two as part of the adapted surrogacy contract balances the interests in this for both the surrogate and the intended parents. Added to this distinction was the importance of given the intended parents the choice to give parental rights when a surrogate has repeatedly breached the contract. In paragraph 3.3 I argued that if a surrogacy contract is signed as intentionally and with as much understanding of its importance as an advance directive it should be accepted. In this chapter it was also argued that prejudices, for example about women being better caretakers than men, are the result of societal constructions that can limit women's autonomy. In the next chapter I will look more into the impact of society on a surrogate's autonomy and the second element of a surrogacy market: payment.

An important argument against surrogacy is that it is different than other human labour and therefore it should be treated differently.⁹⁸ By not treating a surrogacy contract in the same way as other contracts I am confirming this standpoint. However, I will argue that this is not a valid argument not to pay women for their labour as when a woman's autonomy is respected, surrogacy can be a way to break with restricting patriarchal structures. Besides this, we also live in a capitalistic society where respect is shown by paying a fair wage for labour. I will argue that if we regulate the market and adapt the contract for surrogacy to respect autonomy, a step can be made towards a regulated surrogacy market in The Netherlands that is preferable over altruistic surrogacy.

⁹⁷ Lieber, "Selling the womb: can the feminist critique of surrogacy be answered," 216.

⁹⁸ Anderson, "Is Women's Labor a Commodity?," 89-90.

4. Payment and autonomy

So far I have focussed on adapting the use of a contract specifically for a surrogacy market. In this chapter I will pay attention to arguments about the impact of society and the second element of a surrogacy market: payment. I will start discussing how a lack of money can take options away from people and therefore limit their autonomy (§4.1). In chapter one I argued that surrogacy needs to be treated differently from other human labour in order to protect the surrogate's autonomy. In paragraph 4.2 I will argue that accepting this difference should not be used as an argument not to pay women for their labour as this is limiting women's autonomy by building on to prejudices and patriarchal structures. A regulated surrogacy market can be a way to break with patriarchal structures and as we also live in a capitalistic society, where respect is shown with payment, women should be paid a fair wage for their labour.

§4.1 Ability to make an autonomous decision

So far it was assumed that the surrogate and the intended parents made an autonomous decision to sign the surrogacy contract and this has been the base of the argumentation up until this point. It is important to recognise that there are circumstances that limit people's ability to make an autonomous decision. One requirement to be able to make autonomous decisions is that you have options. Beauchamp and Childress cover this by stating that you need to be able to make a decision without controlling influences that determine the action.⁹⁹ One element of making sure the surrogate and the intended parents have options in the surrogacy process is writing a surrogacy contract that is specifically adapted to their wishes instead of using standard contracts. Another influencing factor is the context in which a surrogacy contract is drawn up and signed. Before looking at the influence of a patriarchal society on women's ability to autonomously sign a surrogacy contract (§4.2) I will look at the role money can play in taking away options.

When you are struggling financially, the money that can be earned with surrogacy can become the main motive for signing a commercial surrogacy contract. When people see commercial surrogacy as the only solution to their problems it is no longer a free and autonomous decision to become a surrogate.¹⁰⁰ Examples of this can be seen in countries with extreme poverty like Afghanistan, where people donate their kidney to earn some

⁹⁹ Beauchamp & Childress, "Principles of Biomedical Ethics", 58.

¹⁰⁰ Klein, *Surrogacy: a human rights violation*, 16.

money to buy food for their families.¹⁰¹ An Afghan woman who was interviewed about this topic mentioned that if she cannot sell her kidney her only other option is to sell her one year old daughter.¹⁰² This is no longer about choice, but about survival. Financial desperation is a clear controlling influence that limits the possibility of making an autonomous decision as you are being forced by the circumstances you are living in.¹⁰³ This can lead to the conclusion that financial desperation needs to be a reason not to accept a signed surrogacy contract as it was not an autonomous decision to sign it. The contract should therefore not be legally binding as this is an act of exploitation. However this introduces a new problem: denying people the option of working as a surrogate restricts their options even more.

When you exclude people from signing a contract that can help them improve their lives, you are taking away their independence to take control over their own life and in more extreme cases, taking away their chance of survival.¹⁰⁴ Respecting autonomy is too important to see this as an argument to also accept surrogacy contracts from people who were not able to make the autonomous decision to sign a contract like this. However, the problem here is not the surrogacy contract itself, but the fact that there are people who live in circumstances that are forcing them to make decisions they otherwise would not make. This is the problem that needs to be addressed, not lowering the requirements for a valid surrogacy contract. As stated before, being able to make an autonomous decision, means you need choices. If a surrogacy contract is the only choice that remains, the answer is not accepting this contract, but offering more choices. Describing the details of what choices need to be offered and in what way is outside the scope of this thesis. However, voting against commercial surrogacy contracts, because we are living in a world build on inequalities is not a justified reason to, on the one hand make commercial surrogacy contracts illegal as this does not solve the problem and on the other hand not to take action to improve the equality and the living circumstances of people. If you take away the surrogacy contract option, because of the inability to make an autonomous decision, the human response is to offer other options to help people regain their autonomy by improving their circumstances instead of exploiting them. Judging by the immense inequalities in the world and our failure to provide all people with basic human needs as enough food, clean water and a safe place to call home, I believe the chances are pretty slim that those who cannot make the autonomous decision

¹⁰¹ Agence France-Presse, "Desperate Afghans resort to selling their kidneys to feed families", *AFP*, Februari 28, 2022. <https://www.france24.com/en/live-news/20220228-desperate-afghans-resort-to-selling-their-kidneys-to-feed-families> (accessed July 4, 2022).

¹⁰² *Idem*.

¹⁰³ Janice Radcliffe Richards, "Consent with inducements: The case of body parts and services," In: *The ethics of consent: Theory and practice*, ed. Franklin Miller and Alan Wertheimer (Oxford University press, 2010), 289-290. DOI: 10.1093/acprof:oso/9780195335149.001.0001

¹⁰⁴ *Idem*, 288.

to sign a surrogacy contract will be offered options to improve their autonomy. This means the risk of exploitation remains in the case that autonomy is limited by financial desperation. If this human failure should be a reason to ban all surrogacy markets or even all surrogacy arrangements is outside the scope of this thesis, but an important question for further research.

Financial desperation is a clear example where autonomy can be limited by the circumstances. In response to the question how to draw a line between the ability to make an autonomous decision and not being able to anymore, Beauchamp and Childress state that this is also related to specific situations. Rarely anyone is incapable of making autonomous decisions about all aspects of their life.¹⁰⁵ It is important to recognise that only general criteria can be established for when the option of making an autonomous decision is limited as there often is no clear line between controlling and noncontrolling influences.¹⁰⁶ With surrogacy policy this will have to be a point of interest to guard the balance between respecting autonomy and paternalism.

In the next paragraph I will discuss another role of money in a regulated surrogacy market: paying the surrogate for her labour. Currently it is not allowed in The Netherlands to pay a surrogate for gestational labour. I will argue that specifically in a patriarchal and capitalistic society, not paying women for their labour is a form of exploitation that limits their autonomy. If we want to make a step towards a regulated surrogacy market where the surrogate's autonomy is respected, surrogates should be paid a fair wage.

§4.2 Altruistic surrogacy: accepted exploitation

An important argument against commercial surrogacy is based on ideas of asymmetry.¹⁰⁷ The asymmetry thesis, as Debra Satz refers to it, states that there is an intrinsic difference between gestational labour and other human labour and therefore it should be treated differently.¹⁰⁸ As argued in chapter one, approaching a surrogacy contract in the same way as any other contract for human labour will harm the surrogate's autonomy. By proposing a different approach to the use of a surrogacy contract and specifying circumstances to use this while respecting the surrogate's autonomy, I am confirming this asymmetry thesis. However, I do not agree with using this asymmetry thesis to argue that surrogates should not be paid for their labour.

¹⁰⁵ Beauchamp and Childress, *Principles of Biomedical Ethics*, 72.

¹⁰⁶ *Idem*, 95.

¹⁰⁷ Satz, "Markets in Women's Reproductive Labor," 107.

¹⁰⁸ *Idem*.

Currently altruistic surrogacy is the only legal kind of surrogacy in The Netherlands. This is often presented as the kind of surrogacy that is more respectful to women compared to a surrogacy market. However, with altruistic surrogacy women are being asked to offer labour for free that includes risks to their physical wellbeing and includes uncomfortable procedures.¹⁰⁹ This is significant because first of all, women are asked to be generous in a society that has a history of relying on women's generosity to care for others in a way that is not expected of men.¹¹⁰ Second, currently women are still not paid the same wage as a man doing the same job in The Netherlands.¹¹¹ Part of this can be explained by women taking on more unpaid work, like caring for children, or ill family members and taking on the majority of household duties.¹¹² For Satz this is the asymmetry that is relevant when discussing surrogacy.¹¹³ According to her a surrogacy market reinforces social relations of gender domination and gender hierarchies in a way that other labour markets do not.¹¹⁴ She interprets a surrogacy market as a construct for women to sell control over their body. Within a patriarchal society she sees it as problematic for a woman to give up control to a man by working as a surrogate.¹¹⁵

By regulating a surrogacy market and adapting it to respect the surrogate's autonomy no unacceptable amount of control will be given up as argued in the previous chapters. Surrogacy is indeed happening in a patriarchal society where women are paid less, get less chances, have to deal with unequally split care duties that are underappreciated, etc. Taking the choice away from women to accept a job they want, in this society, is also paternalistic and limiting their freedom even more. Denying women the opportunity to act on an autonomous desire to do gestational labour, in this context, is confirming the prejudice that women's labour is worth less than men's. It also confirms the prejudice that women are naturally the caretakers of the world and are therefore at risk of becoming or staying financially dependent on men.¹¹⁶ This form of legalised exploitation is part of a political and social context of gender inequality that currently characterises our society.¹¹⁷

Surrogacy is often presented as a step back in time as it is perceived to be a way for men to regain control over women's reproductive abilities.¹¹⁸ Making abortion legal is

¹⁰⁹ Mcleod, "For dignity or money", 269.

¹¹⁰ Idem.

¹¹¹ Centraal Bureau van de Statistiek, "De arbeidsmarkt in cijfers 2021," *cbs*, June 13, 2022,

<https://longreads.cbs.nl/dearbeidsmarktincijfers-2021/lonen-en-loonkosten/>

¹¹² OECD, "Part-time and Partly Equal: Gender and Work in the Netherlands", (Paris: OECD Publishing, 2019), 12-13. <https://doi.org/10.1787/204235cf-en>

¹¹³ Satz, "Markets in Women's Reproductive Labor," 109 – 110.

¹¹⁴ Idem, 110.

¹¹⁵ Idem, 125.

¹¹⁶ Mcleod, "For dignity or money," 268.

¹¹⁷ Satz, "Markets in Women's Reproductive Labor," 109 – 110.

¹¹⁸ Lieber, "Selling the womb: can the feminist critique of surrogacy be answered," 205.

a right that was fought hard for (and clearly we are not done fighting), as this right gives women the freedom to choose not to bear children.¹¹⁹ However, surrogacy can also be an extension of the abortion right. Where the abortion right is focussed on giving a woman the choice not to bear a child, surrogacy is giving a woman the right to bear a child.¹²⁰ This is one example of how accepting a regulated surrogacy market in a patriarchal society can also be seen as a way to improve a women's autonomy.

Another way that accepting a regulated surrogacy market can improve women's autonomy is by breaking with the patriarchal idea that motherhood is gestational-based and focus on parenthood as being intent-based.¹²¹ In the intent-based parenthood view all parents are seen as more equal, instead of the unequal difference between motherhood and fatherhood, where the mother is seen as the main parent. A role that she is pushed in by the way our society is organised and views motherhood. An example of this was given in paragraph 3.2.1. This also limits the fathers chances to develop a similar, and just as important, parenting relationship with their child.¹²² Brighouse and Swift's intimate relationship definition of parenthood matches well with the idea that parenthood should be intent-based. They state that the parent-child relationship is an unique relationship where an adult can experience a good combination of joys and challenges and has to meet a distinctive set of demands.¹²³ What children need from parents is not simply the judicious exercise of expertise and authority, being kept safe, enjoying themselves, being sheltered and well-nourished, but also to have a loving relationship with others.¹²⁴ This is also confirmed by surrogacy children themselves in interviews where they stated that what matters most to them "is the quality of relationships within their family, the support of their wider community, and the attitudes of the society in which they live."¹²⁵ Questions about different family forms and the wellbeing of surrogacy children are very relevant in the surrogacy debate, but they are outside the scope of this thesis. What is important here is that intent-based parenthood can give women more chances to choose their own path as it avoids bonding children to women in circumstances where women did not intent to be a parent.¹²⁶

Just because reproductive labour needs to be treated differently from other human labour when it comes to contracts does not mean that surrogacy without a

¹¹⁹ Lieber, "Selling the womb: can the feminist critique of surrogacy be answered," 205.

¹²⁰ It is assumed here that the surrogate already has children of her own as this is often a requirement to be a surrogate. Whether this is justified or not is a question that is outside the scope of this thesis.

¹²¹ Mcleod, "For dignity or money," 273.

¹²² Harry Brighouse and Adam Swift, "The goods of parenting," In *Family-making: Contemporary ethical challenges*, ed. Francoise Baylis and Carolyn McLeod, (Oxford: Oxford university press, 2014), 22.

¹²³ Idem, 16.

¹²⁴ Idem.

¹²⁵ Susan Golombok, *We Are Family: What Really Matters for Parents and Children*, (Brunswick, Victoria: Scribe Publications, 2020), 172.

¹²⁶ Mcleod, "For dignity or money," 273.

contract does respect the autonomy of surrogates. When the surrogacy market is regulated surrogacy can improve the equality between parents by valuing intent-based parenthood over gestational-based parenthood. This can be a step to breaking with elements of the patriarchal society that limit women's autonomy.

Another argument why a regulated surrogacy market is preferable over altruistic surrogacy is that we not only live in a patriarchal society, but also in a capitalistic one.

Within capitalism being paid to do something for other people is a sign of respect.¹²⁷

Asking, specifically women who are already paid less than men, to do gestational labour for free is disrespectful and unfair. Resecting a woman's autonomy also means accepting she might make a choice against the norm or against someone else's values, like choosing to do reproductive labour. With a regulated surrogacy market the focus is more on paying a fair amount for specific labour rather than just making profits.¹²⁸ This is similar to restrictions on payment like the minimal wage, rent control, the prohibition of child labour, etc.¹²⁹ Accepting a surrogacy market like this can be a step towards breaking with the patriarchal ideas of parenthood and therefore giving women more freedom to make their own autonomous choices regarding gestational labour.

¹²⁷ Mcleod, "For dignity or money," 274-275.

¹²⁸ Margaret Jane Radin, "Market-Inalienability", *Harvard Law Review*, Vol. 100, No. 8 (1987): 1870-1871 + 1873. <https://www.jstor.org/stable/1341192> (accessed June 11, 2022).

¹²⁹ Radin, "Market-Inalienability," 1919.

Conclusion

With a new law proposal for surrogacy that needs to be rewritten before it will be considered by parliament it is important to discuss the implications of this proposal and the ethical considerations for surrogacy policy. As the current law proposal keeps commercial surrogacy contracts illegal within the Dutch borders, but accepts them if the surrogacy process happened outside The Netherlands the focus of this thesis was on the question if a regulated surrogacy market in The Netherlands can respect the surrogate's autonomy and be an alternative to altruistic surrogacy. I started this thesis with accepting that surrogacy needs to be treated differently from other human labour as just making the autonomous choice to sign a contract is not enough if we want to protect the surrogate's autonomy during the full surrogacy process. The aim of this thesis was to take a first step in arguing that a regulated surrogacy market is preferable over altruistic surrogacy under specific circumstances. I will summarise my conclusions by highlighting the adaptations that I proposed in this thesis. After this I will discuss some limitations of this thesis and give suggestions for further research.

To start with I have redefined the standard of performance for surrogacy to giving the intended parents a fair chance of parenthood. I concluded that constantly watching the surrogate to see if she is complying with the contract is limiting her autonomy a lot and this is not a necessarily consequence of using a contract, as the example of moral clauses in sports contracts showed. This also led to the conclusion that a certain level of trust between the surrogate and the intended parents remains essential in a regulated surrogacy market. It was concluded that a surrogacy contract needs to match the specific wishes and requirements from the intended parents and the surrogate to maximise their options and improve their autonomy. A clear responsibility distinction, where the surrogate is responsible for the fetus and the intended parents are responsible for the child, means the surrogate's right to bodily integrity is protected. This also protects the intended parents by taking away the fear that the surrogate might not give them their child after birth. This is an important value of using a surrogacy contract.

In chapter three I concluded that if we want to respect women's autonomy they need to have the choice to accept or deny a commercial surrogacy contract. Second, I proposed a limitation to their autonomy by concluding that giving women the contractual freedom to be granted parental rights if she has bonded this strongly with the fetus is not desirable as this would mean accepting reproductive essentialism. However, I also stated that the changes of a bond between the surrogate and the fetus that is strong enough for her to want parental rights is not as great as it is often presented. A question remains if enough can be done to avoid all autonomy concerns and risks for long term harm to surrogates because of the chance they will deeply bond with the fetus. A third adaption

that was discussed in this chapter is that a surrogacy contract should be treated with as much intentionality and understanding of its importance as an advance directive to accept it as a valid contract. This includes, for example, a clear understanding of the fact that by signing the contract the intended parents are giving up the right to make decisions about continuing or terminating the pregnancy. In chapter four I focussed on the element of payment in a surrogacy market and concluded that a regulated surrogacy market can help in breaking with autonomy limiting elements from the patriarchal society. As respect is shown with payment in a capitalistic society not paying women for their labour is disrespectful and unfair. This makes a regulated surrogacy market preferable to altruistic surrogacy when it comes to dealing with the autonomy of the surrogate.

These adaptations were proposed while arguing from the assumption that respecting the surrogate's autonomy in a surrogacy process needs to be a first priority when answering questions about what form of surrogacy we should accept or reject in The Netherlands. Some may argue that other concerns are more important or at some point the price for respecting autonomy becomes too high. I believe that the possible debate about this can be helpful in exploring ways to improve the surrogacy policy in The Netherlands. This leads to some of the limitations of this thesis.

First of all in this thesis I made the choice to focus only on the autonomy of the surrogate. Because of this a lot of other, related, concerns were placed outside the scope of this thesis, like important questions about the physical and psychological wellbeing of surrogacy children. Only including the surrogate's autonomy is not enough to justify stating that a regulated surrogacy market should be accepted in The Netherlands and that this is preferable over altruistic surrogacy. However, as there are important concerns related to the surrogate's autonomy, discussing this is an important first step.

A second important limitation is that in this thesis I argued from the assumption that the contract ends when the pregnancy ends (successful delivery or not), but this does not have to be the case. A problem that came up with transnational surrogacy markets is that no one took responsibility for the surrogates after they delivered.¹³⁰ As pregnancy and delivery complications can be fatal or they can be severely debilitating both physically as psychological it is important to discuss the responsibility after pregnancy and possibly make this part of a surrogacy contract. Further research is needed to decide how these issues should be handled in The Netherlands.

There are many other important questions that need to be answered with further research. For example about the impact of artificial reproductive technologies (ART), like

¹³⁰ Amrita Pande, "Cross-Border Reproductive Surrogacy in India.", In: *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues*, ed. E. Scott Sills, (Cambridge: Cambridge University Press, 2016), 144. DOI:10.1017/CBO9781316282618.020.

surrogacy, on our understanding of family and parenthood and how we can use public policy to protect all parties. Questions to consider here for example, are: 'should people be able to start a surrogacy process alone and knowingly become a single parent?' or 'how should we deal with families with more than two parents and should these families have access to surrogacy?'. In this thesis the intent-based parenthood view by Brighthouse and Swift was mentioned as a starting point, but there are many other views to consider in regards to different questions.

The aim of this thesis was not to provide policy, but to take a first step in arguing that a regulated surrogacy market is preferable over altruistic surrogacy under specific circumstances. Therefore several questions are left open in this thesis that would need to be addressed in more detail to make this approach suitable for policy. Examples of this are further defining what 'a fair chance of parenthood' should mean in policy terms and specifying who needs to determine a breach of contract and what the exact requirements are to speak of a breach of contract. The issue of breach of contract and the consequences was only briefly discussed. Only one possible consequence of a breach of contract was considered for the intended parents and the surrogate. This needs to be discussed further and other possible ways of dealing with this needs to be discussed in future research. Even more important, the possible situation and the consequences of the intended parents breaching contract has not been discussed in this thesis at all. A possible breach of contract could be that the intended parents try to coerce the surrogate to behaviour (like to terminate the pregnancy) and limit her autonomy this way. I already argued that a monetary compensation will never be enough to compensate for a loss of autonomy and therefore this will not be a suitable consequence. If actions like coercion as a breach of a surrogacy contract can be treated by already existing law or not is an important issue for further research.

Another point that has not been fully explored in this thesis is how to deal with the disconnect between on the one hand stating that we have a human responsibility to offer people more chances when financial desperation is limiting their autonomy and on the other hand the reality of failure to significantly improve the equality in the world. As stated in the introduction surrogacy is very much influenced by cultural values. This does not mean that knowledge should not be shared between countries as other experiences are still a valuable source of information, but it means that the cultural differences need to be taken into account in research and when working on public policy. A regulated surrogacy market that works here in The Netherlands, might cause problems in other countries. A limited autonomy because of several financial desperation might be a less urgent issue within The Netherlands this might be a less urgent issue in regards to a regulated surrogacy market proposal as class differences are smaller here than in some other countries with a transnational surrogacy market. However, this does need to be

addressed, especially in regards to the questions like if a regulated surrogacy market in The Netherlands is accepted, should it only be accessible to people living in The Netherlands or also to people from abroad?

As shown above there are many more questions to ask in regards to surrogacy policy in The Netherlands than I was able to discuss in this thesis. However, some common and important arguments against surrogacy markets were discussed in relation to the proposal to improve the surrogate's autonomy by making a distinction between the fetus and the child in terms of responsibility. Based on this I will conclude that it is possible to build a surrogacy market that is regulated in a way that it respects the surrogates autonomy even though many steps need to be taken in future research to address the points discussed above and translate this analysis to well written public policy. As argued, altruistic surrogacy also limits women's autonomy and therefore a well regulated surrogacy market will be preferable to the currently accepted altruistic surrogacy. An important step in respecting women's autonomy is for women to take control by presenting viable and reproductive legislation. Hopefully this thesis can play a small role in contributing to this.

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